I. INTRODUCTION

The American Bar Association’s Model Rules of Professional Conduct (hereinafter the “ABA Model Rules” or “Rules”) were originally adopted by the ABA House of Delegates in 1983 and, in various forms, since been adopted by each of the several states except California. In today’s challenging world of healthcare law, lawyers often face difficult issues of professional responsibility. For example, attorneys often find themselves with multiple clients whose once common interests may later turn to adverse interests. Further, given the ever increasing government scrutiny of healthcare entities, attorneys often face complicated issues in discharging their duties.

As noted in the ABA Model Rules’ Preliminary Statement, the same rules apply to all lawyers, regardless of the type of law practiced - be it in-house for a large hospital chain or a partner at a medium-sized law firm representing numerous clients in the healthcare industry. A healthcare lawyer owes duties of client confidentiality, loyalty, and diligence to all of his or her clients, while at the same time, that same lawyer must balance parallel duties to society and non-clients (one obvious example is refraining from assisting any client in the commission of a crime or fraud) as well as honoring the duty of candor to any legal tribunal.

The following discussion is based on the ABA Model Rules of Professional Conduct (2009) (the “Model Rules”). The Model Rules form the basis of each state’s specific rules of professional responsibility. However, the variations among the states are significant (e.g., some states have adopted the Model Rules but not the Comments; some have adopted earlier versions of some rules but not later amendments, etc.), and it is important to remember that the actual rules in a lawyer’s jurisdiction(s) of licensure are what govern that lawyer’s specific responsibilities. Accordingly, the discussion herein should be considered in light of the fact that it is likely to be more correct in some jurisdictions than in others.

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II. PRIMARY ETHICAL OBLIGATIONS

A. CANDID LEGAL ADVICE

Duty to provide candid, sound legal advice whether it is favorable or not to your client’s objectives.

1. Includes duty to exercise independent professional judgment.

2. Advice should include the application of sound legal principles and judgment to the client’s stated objectives and/or circumstances, and includes advice as well as to moral, economic, social, or political considerations as may be relevant to that particular client’s needs.

3. Advice should provide necessary technical legal advice so as to foster and encourage good corporate decision-making in compliance with all applicable federal and state laws, and which results in fair dealings with all others.

4. A lawyer’s discussion with a prospective client during an initial consultation should be tailored to avoid exposure of information that may later disqualify that representation with the intention that the meeting is for the limited purpose of determining whether the lawyer will be able to represent this prospective client. The lawyer is bound to keep any information confidential (unless there is a countervailing consideration as to a present client) even if that lawyer declines to undertake the legal representation of the prospective client.

See ABA Model Rule 2.1 (Advisor) and Comment, citing also Rule 1.9 (Duties to Former Clients), Rule 1.18 (Duties to Prospective Client) and Rule 1.0 (e) (Terminology).

B. DUTY TO THE ORGANIZATION

The healthcare client setting often means dealing with many individuals (such as the Chief Executive Officer, the chairman of the Board of Directors, individual directors or officers, shareholders, other employees, and/or in-house counsel), all for the sole benefit of the corporate “person.”

1. Duty to protect the organization from “substantial injury.”

2. Controlled by “best interest” of the organization.

3. Duty to report to “higher” and perhaps “highest authority” any alleged violation of a legal obligation or violation of law that could be imputed to the organization “if warranted by the circumstances.”

4 Where the client is a public company, there is a separate set of obligations arising under 17 C.F.R. Part 205, the “attorney conduct rules” adopted pursuant to Section 307 of the Sarbanes-Oxley Act of 2002. In that case, an attorney “appearing and practicing before” the Securities and Exchange Commission who
4. Despite general confidentiality requirements, if the lawyer’s efforts fail, the alleged improprieties may be disclosed “but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.” This exception to the general rule of client confidentiality expressly does not reach an “alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.” Further, any discharge or withdrawal of legal representation must be communicated to the organization’s “highest authority.”

5. Remember the identity of your client is the organization itself and the lawyer “shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”

6. Subject to the rule on conflicts of interest, a lawyer may represent the organization as well as its directors, officers, employees, members, and shareholders, and if consent to dual representation is required by the organization, it must be obtained from an individual other than the one who is being represented or by the shareholders.

7. Where actual or potential conflict arises between the organization and one of its constituents, the constituent should be notified to obtain independent legal representation and the discussions between the lawyer for organization and constituent may not be privileged, depending on the particular facts at hand.

8. Defending shareholders’ derivative actions brought against corporate directors may turn upon the seriousness of the charges brought, and a conflict of interest may arise between the lawyer’s duty to his or her organizational client and his or her relationship with the Board of Directors.

9. A healthcare lawyer who represents one healthcare corporation does not, by virtue of that representation, also represent that corporation’s parent or subsidiary. Therefore, that attorney is not limited in accepting a representation that may be adverse to that parent or that subsidiary corporation.


6 *See Am. Bar Ass’n Standing Comm. on Ethics & Prof’l Responsibility, Formal Opinion 95-390, “Conflicts of Interest in the Corporate Family Context” (Jan. 25, 1995). The Committee’s majority conclusion was summarized as follows:*
See ABA Model Rules, Rule 1.13 (Organization as Client) and Comment, citing also Rules 1.6 (Confidentiality of Information) and 1.7 (Conflict of Interest: Current Clients) and Comments.

C. THE CORPORATE “MIRANDA WARNING”

There are times when an organization’s interests may be or become adverse to one of its constituents. For example, it may be discovered in the course of a peer review proceeding such as a hearing regarding privileges or panel membership, that there was some wrongdoing or violation of bylaws or a procedure by an officer or director of the organization. It is also possible that an employee, officer or director of a corporate client acted outside the scope of his or her authority or in some manner that was not sanctioned by the organization, such as committing an act of defamation.

In such a circumstance, the lawyer must advise the employee, officer or director that the lawyer is not representing the individual.\(^7\) The obligation to provide notification that the organization’s interests are adverse to the individuals with whom they interact has been referred to as the "Corporate Miranda Warning."\(^8\)

The “Corporate Miranda Warning gives rise to a fundamental practical concern: Can you be effective in representing the organization if, after your well-crafted, ethical admonition to the employees, none of them will talk to you? Remember that Model Rule 1.13(f) explicitly requires that "a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing." One commentator suggests that Model Rule 1.13 requires an attorney to give at minimum a warning similar to the following before continuing any conversation:

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\text{A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client’s corporate affiliates; or if the lawyer’s obligations to either the corporate client or the new, adverse client, will materially limit the lawyer’s representation of the other client.}
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\(^7\) Further, the lawyer may be under an obligation to suggest that the individual consider obtaining independent representation, as many jurisdictions have adopted ethical considerations on dealing with unrepresented persons. See, e.g., Model Rule 4.3; Model Code of Professional Conduct DR 7-104(A)(2).

\(^8\) Professional Service Industries, Inc. v. Kimbrell, 758 F. Supp. 676 (D. Kan 1991). "[A] Miranda-type warning" is required when it is likely a corporate officer could be confused over whether corporate counsel was likewise representing his interests." 785 F. Supp. at 684.
- I do not represent you. I represent the Company.

- If you tell me you have done something wrong, I must report it to your supervisor, or other persons in the company charged with investigating wrongdoing. I may also have to suggest that your supervisor or the person(s) designated by the Board of Directors to investigate wrongdoing initiate an action to end your employment and/or other legal action against you.

- If you would like to talk to your own lawyer before we talk, I encourage you to do so.

- In fact, just so you understand clearly, the attorney-client privilege does not necessarily apply to anything you tell me. At some future date I might be called to testify in court about what you tell me now, and our conversation would not be privileged. I would be required to tell the Court about it. I might be asked by the Company to repeat our conversation to a prosecutor or an investigator. Your statement is NOT privileged just because I am a lawyer.

- All right, having heard all that, are you willing to talk to me now?9

D. RULE OF CONFIDENTIALITY

Duty to keep all information furnished by each client confidential as to that particular client.

1. The general rule is that a lawyer must keep any information relating to a client’s representation (extends to a prospective, present, or past client) confidential unless that client allows otherwise in writing through “informed consent.” Rule extends to both client communication as well as to information relating to that representation from whatever source.

2. Exceptions are limited to situations where the lawyer reasonably believes such disclosure is necessary to:

   a. Prevent reasonably certain death or substantial bodily harm.” The “harm” is generally defined as harm that is “reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.”

   b. Prevent a client “from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.” “Fraud” or

“fraudulent” is defined as “conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” The rule does not generally require that the lawyer report the crime or fraud to legal authorities, but the lawyer “may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent.”

c. “Prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

d. “To secure legal advice about the lawyer’s compliance with these Rules.”

e. “To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.”

f. “To comply with other law or a court order.” If another law or court order demands disclosure, such disclosure also must be communicated to the client.

3. “Informed consent” is defined as an “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” See ABA Model Rule 1.0(e). The information to be provided to the client depends upon the nature of the conflict, and the nature of the risks involved, including possible effects on loyalty, confidentiality, and attorney-client privilege. The cost of new legal representation along with the benefit of common representation may both be considered as factors to determine whether common representation is in that client’s best interest.

4. In the context of the healthcare industry, an open exchange of information allows a lawyer to effectively represent his or her client in light of a complex industry highly regulated by both state and federal governments against sometimes severe sanctions for non-compliance and ever-changing regulations.

5. A lawyer may consider using confidentiality agreements to protect proprietary information in litigation or arbitration of legal disputes unless such information is already protected by other law or privileges (such as attorney-client or work product privileges).

6. The duty of confidentiality continues even after the attorney/client relationship has been terminated.

See ABA Model Rule 1.6 (Confidentiality of Information) and Comment.
A healthcare lawyer owes a duty of loyalty and a duty to use independent judgment in their relationship with his or her client. Implicit therein is the duty to avoid actual or potential conflicts of interest that could arise from that lawyer’s relationship with other clients (former, current, or prospective), a third person, or the lawyer’s own personal interests.

1. Identify the actual or potential conflict by:

   a. Examining who are the actual client or clients.

   b. Determining whether there are any conflicting issues. A conflict of interest exists if there is a significant risk that the lawyer’s representation of one client will materially limit that same lawyer’s legal representation of another client. Relevant factors for determining whether the limitation would be material include: the duration and involvement of the lawyer in the prior representation; the type of legal work performed; the likelihood disagreements could arise; and the possible prejudice to the prior client should a conflict arise.

   c. Determining whether the conflict is such that it is waivable, and then determining whether the clients need to be advised of the perceived risks. Factors to consider for determining whether client consent is required include: the specific facts of where the cases are pending; each client’s relationship to the other; the relationship between the legal matters at issue; the interests of each client in the litigation; and the clients’ expectation from the legal representation. The general rule is that between commonly represented clients, each does not retain an attorney-client privilege as to the other, and if litigation between the two clients would later ensue, the clients should be informed that the privilege does not protect these attorney-client communications. Clients should also be advised that should one client later refuse to share certain information with the other client, the lawyer may have to terminate the common representation. Any limitation on the common representation (i.e. the trade secrets of one client will not be shared with the other client) should be fully explained to each client prior to the common representation.

   d. If waivable, consult with affected clients and request a waiver confirmed in writing. The issue of informed consent must be answered as to each client individually. Common representation may be possible if the clients are generally in agreement as to their positions in the litigation even though those positions are not identical.

   e. If not waivable, determine whether legal representation must be withdrawn or declined in accordance with the Rules. A lawyer cannot represent multiple clients whose interests are fundamentally opposed or antagonistic to another client’s position.

   f. If a lawyer represents two clients in a related matter and one of the two clients refuses to consent to the common representation, the lawyer thereafter cannot ask the second client to consent. Each party will thereafter have to secure other legal representation at what is likely to be additional expense.
g. If the healthcare lawyer conducting a transactional matter is asked to represent the “buyer” of a business in which the lawyer previously represented the “seller” during prior negotiations, although not the same transaction, the lawyer cannot undertake this new legal representation of the “buyer” without the written informed consent of the “seller.”

2. In today’s era of healthcare mergers, sales, and acquisitions, a healthcare lawyer may see conflicts of interest emerge in the midst of any legal representation. Depending on the circumstances, the lawyer may have to withdraw as legal counsel for one of the entities, but still will be under a duty to protect those confidences even after the lawyer has withdrawn. In the context of a healthcare corporation (for instance, a health maintenance organization) there may be other competing interests that could arise due to fiduciary relationships with beneficiaries or shareholders wherein conflicts may arise.

3. A lawyer cannot later become an advocate in a matter against a former client the lawyer previously represented even if the matters are wholly unrelated. The rationale stems from the duty of loyalty and assumes that the lawyer would be impaired in his or her ability to represent the present client effectively out of deference to the former client. However, simultaneous legal representation of two current clients whose only adversity is purely economic and the litigation is otherwise unrelated, may not constitute a conflict of interest that gives rise to the requirement of informed, written consent.

4. A healthcare lawyer representing several clients in the formation of a joint venture may bring with it inherent restrictions on the lawyer’s ability to recommend or advocate all possible positions that each client might consider because, to do so, would compromise the lawyer’s loyalty as to one client against the other. In other words, because of the multiple legal representations, alternatives to some of the clients might be foreclosed because of the lawyer’s loyalty to the other clients. The lawyer must determine whether divided loyalties would arise to the point that the lawyer’s independent professional judgment as to each client would be materially affected such that alternatives or other courses of actions would be by-passed due to conflicting loyalties with any other client.

5. A lawyer should keep in mind that if common representation fails because adverse interests cannot be reconciled, that lawyer could end up facing embarrassment, recrimination, or damage to his or her professional reputation at the very least, and disciplinary action or malpractice claims at the very worst.

6. A lawyer is prohibited from using information obtained during legal representation of any client to the disadvantage of that client unless that client gives informed, written consent. The rule does not prohibit uses that do not disadvantage the client if that information obtained to benefit one client may be used to the benefit of all other clients (i.e., the government’s favorable interpretation of a health care regulation may be used to the advantage of all clients).
See ABA Model Rules, Rule 1.7 (Conflict Of Interest: Current Clients) and Comment, and Rule 1.8 (Conflict of Interest: Currents Clients: Specific Rules) and Comment.

F. SAFEGUARDING CLIENT-PROVIDED INFORMATION

Duty to protect former clients from adversity that may arise through representing later clients.

1. A lawyer negotiating with a new client is prohibited from representing that new client if:

   a. The matter is the “same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client” unless the former client provides informed consent in writing.

   b. Same restriction applies as to a law firm with which that lawyer was formerly associated.

   c. Lawyer cannot use any confidential information previously obtained in a prior legal representation to the disadvantage of that former client or otherwise reveal the same.

   d. A lawyer who has represented multiple clients cannot later represent one of those clients against the previous clients if a later dispute arises on the same or substantially related matter, unless all affected clients provide their informed consent.

   e. Restriction does not apply to information that has been made public.

   f. General knowledge of an organization’s policies and practices do not preclude a subsequent adverse representation unless specific facts were obtained from prior representation that are relevant to the current representation.

   g. In order to succeed on a motion to disqualify a lawyer from a subsequent adverse legal representation, the former client need not disclose confidential information that is being used in the latter legal representation because the possession of such information is presumed based upon the nature of the prior legal services performed and would be information a lawyer naturally learned by providing such legal services.

   h. A lawyer seeking to rebut a former client of another lawyer associated with his or her law firm in moving for the disqualification of a law firm on the grounds of that former lawyer’s subsequent adverse representation must demonstrate that he or she was not privy to that confidential information. The rule infers that a lawyer is privy to all information about all of that law firm’s clients.

See ABA Model Rule 1.9 (Duties To Former Clients) and Comment.
G. DECLINING/WITHDRAWING LEGAL REPRESENTATION

A healthcare lawyer must withdraw their legal representation if he or she is discharged or if his or her continued legal representation will be in violation of these Rules. However, that withdrawal must be:

1. Accomplished without material adverse effect to the client’s interests.

2. Based upon a lawyer’s reasonable belief that the client’s actions are criminal or fraudulent, or that the client is using the lawyer’s service to perpetuate a crime or fraud.

3. Based upon a lawyer’s position that the client’s course of action is repugnant or fundamentally disagrees with the lawyer’s personally held views.

4. Based upon the client’s failure to fulfill their obligation (i.e., payment of past due legal fees) and upon reasonable notice and warning – the lawyer will withdraw unless that obligation is fulfilled.

5. Based upon a finding that the continued legal representation will result in an unreasonable financial burden upon the lawyer or that the legal representation has been rendered unreasonably difficult by the client.

6. Based upon any other good cause for the lawyer’s withdrawal of their legal representation.

See ABA Model Rules, Rule 1.16 (Declining or Terminating Representation) and Comment.

H. PUBLIC STATEMENTS

1. Subject to exceptions for certain specified types of information, including “information contained in a public record”, a lawyer “who is participating or has participated in the investigation or litigation of a matter” is prohibited from making extrajudicial statements that (i) will be publicly disseminated and (ii) “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”.

2. There is a special exception for “a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client”.

3. The rule only applies to lawyers who are or who have been involved in the case and those associated with them in their firm or agency.

4. The comments to the rule identify several categories of statements the subject matter of which is “more likely than not to have a material prejudicial effect on a proceeding”. These include, among other things, opinions as to the guilt or innocence of a defendant or suspect in a criminal case; the possibility of a guilty plea; information
that the disclosing lawyer knows or reasonably should know would not be admissible at trial, where such disclosure creates a substantial risk of prejudicing an impartial trial; and the expected testimony of a party or witness and such person’s character or credibility.

See ABA Model Rules, Rule 3.6 (Trial Publicity) and Comment.

5. **Special Rule Applicable to Statements by Prosecutors.** Model Rule 3.8(f), part of the rule entitled “Special Responsibilities of a Prosecutor”, provides that: "[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [the prosecutor in a criminal case shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or [Rule 3.8]."

I. **ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

1. Where a lawyer represents a client in a proceeding before a legislative body or administrative agency, the lawyer must comply with Model Rules 3.3 (a) through (c) (relating to candor toward the tribunal, as mentioned above), 3.4 (a) through (c) (relating to fairness toward the opposing party and counsel, particularly with respect to evidence, testimony and compliance with the rules of a tribunal), and 3.5 (relating to the impartiality and decorum of a tribunal).

2. The rule only applies to representation of a client “in connection with an official hearing or meeting . . . to which the lawyer or the lawyer’s client is presenting evidence or argument”, and not to lobbying, negotiation, etc.

See ABA Model Rules, Rule 3.9 and Comment.